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INF LLP obtains the dismissal of two consumer Class Actions on the merits instituted against TD Auto Finance Services and Ford Credit Canada

On October 25, 2019, a $23.4 million consumer protection class action was dismissed against TD Auto Finance Services. The Class included 30,443 finance customers whose finance contracts did not disclose a price rebate to which they would have been entitled had they paid for their vehicle in full. A $20 million mirror class action, which involved 23,923 finance customers, was also dismissed on the same date against Ford Credit Canada. Both finance companies were represented by Laurent Nahmiash and Anthony Franceschini of INF LLP.

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The Honourable Justice Serge Francoeur J.C.S. delivered two identical decisions last week, in which he held that class members had suffered no loss as a result of the non-disclosure of this alternative rebate. He also held that class members had failed to prove any veritable damages and were not entitled to any punitive damages, even if the contracts technically breached Section 70 of the Québec *Consumer Protection Act* ("C.P.A."). While the threshold for the authorization of class actions in Québec remains very low, these decisions demonstrate that such recourses can be successfully dismissed on the merits.

I. Section 70 g) C.P.A.

Judge Francoeur opted for a literal reading of this Section and concluded the subject rebate had to be disclosed (even if in fact finance customers had obtained an equivalent rebate in the form of a discounted interest rate). He did not address whether Section 70 g) could in any event apply to all types of rebates and more precisely those which did not create an additional cost of borrowing for consumers.

II. Application of Section 271 and not Section 272 C.P.A.

Contrary to Plaintiff's assertion, the Court also ruled that Section 271 and not Section 272 of the C.P.A. applied. He therefore did not apply the irrefutable presumption of consumer error mandated by Section 272. Instead, he held that Section 70 g) was clearly an indication of credit offence and as such, fell within the ambit of Section 271 and therefore provided Defendants with an absence of consumer error defence.

He also ruled that the rebate non-disclosure did not trigger an offence under Section 12 or Section 83 of the C.P.A., which could theoretically have given rise to the remedies provided by Section 272. In effect, he held that Defendants did not charge any sum to class members which exceeded the effective credit rate (which is another way of saying the rebate did not result in an additional cost of borrowing).

Given the application of Section 271 C.P.A. the Court relied on the ample dealer sworn statements adduced at trial which contradicted the Class Plaintiffs' singular testimony that the rebate had been hidden. Judge Francoeur ruled that, on the contrary, the evidence overwhelmingly proved that the subject rebate had been disclosed to class members. By relying on the procedural history of the cases and their common origin in the *Contat* case, the Court implicitly discredited the Class Plaintiffs' allegations that they had not been advised of the rebate.

The Court also relied on the Duff & Phelps expert report filed by Defendants to conclude that no consumer prejudice or disadvantage had resulted when opting for discounted finance rates instead of the rebate. Based on sample results, no consumer had erred when opting for discounted financing. This absence of error or prejudice was thus entirely exculpatory pursuant to Section 271 C.P.A.

III. Absence of Damages

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Judge Francoeur added that even if Section 272 C.P.A. had applied, he would not have awarded any damages since none had been proven. Section 272 imposed an irrefutable presumption of error/prejudice, but not of damages.

IV. Absence of Punitive Relief

As Section 271 C.P.A. applied, there was no access to punitive relief. Here again the Court added that if Section 272 had applied, it would not have granted any punitive damages in any event. Judge Francoeur relied on a passage of the earlier *Dion* v. *Primus* Court of Appeal decision. In a nutshell, there was no evidence in these cases of any careless disregard for the C.P.A. which could have warranted a punitive award. The alternative rebate practice had also been abandoned by Defendants even before the proceedings were commenced.